

Report of the New Zoning District Subcommittee

**Public Presentation before the Gallatin County Commissioners
Wednesday, November 2, 2005 - 1:30 p.m.**

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REPORT TO THE BOARD OF GALLATIN COUNTY COMMISSIONERS FROM THE NEW ZONING DISTRICT SUBCOMMITTEE- November 2005

I. INTRODUCTION

Background: On February 8, 2005, the Gallatin County Commission (the “Commission”) appointed a subcommittee to prepare recommendations regarding the process of creating new zoning districts. The members were selected from applicants who responded to the public notice for the subcommittee; recruited from pending zoning district committees throughout the county; and invited from the Gallatin County Planning Board. Each of the appointed subcommittee members took an oath of office to uphold the laws and constitutions of Montana and of the United States. (See Appendix 1 for list of members).

A number of factors prompted the Commission to establish this Subcommittee, including:

- Rapid growth in the county stimulating more interest in the creation of zoning districts as well as increased demand on County Planning Department staff to assist in these efforts. Currently, at least six proposed districts are underway, with one district successfully created during past year.
- Citizen requests for guidelines to assist and facilitate their efforts to explore and proceed with forming new zoning districts.
- Legal questions surrounding certain requirements for creating new zoning districts, especially issues related to creating 101 and 201 zoning districts.
- Logistical struggles citizens have had when attempting to initiate new zoning districts.
- Freeholder opposition to the creation of zoning districts due to their perception that they were unfairly biased towards restrictions of freeholder property rights.

In response, the County Commission charged the New Zoning District Subcommittee with the following mission:

“To prepare recommendations with respect to the process for creating new County zoning districts. Committee members shall research zoning efforts currently underway, as well as those of the past, to help determine effective guidelines for citizens to utilize as they contemplate forming a new zoning district. The Committee shall prepare a written report, with a public presentation of such findings before the County Commission”.

Subcommittee Work: The Subcommittee met 24 times from February 24, 2005 through September 2005. Meetings were facilitated by the Community Mediation Center, and the County Planning Department staff provided technical input and logistical support.

Because of the strong division of views on the subcommittee (including open and strong support for creating zoning districts and equally strong support for private property rights), the subcommittee felt it was important to work toward consensus with its recommendations and to avoid confrontational vote-counting “show-downs.” They also felt it was important to establish fair and clear operating guidelines (see Appendix 2) to define their rules of order, roles, meeting procedures, decision-making procedures, communication processes and discussion guidelines.

They researched zoning district creation processes, including the adopted Middle Cottonwood and South Cottonwood Zoning Districts; proposed districts for Bridger Bench (interim), Bozeman Pass, Old Bozeman Trail, East Gallatin, Hamilton Road, Reese Creek; and the Dry Creek Rural Land Use Demonstration Project Conceptual Model. County Planning Department staff members presented information on zoning district formation in Missoula, Flathead and Cascade counties in Montana; and neighboring counties in Wyoming and Idaho.

Legal questions related to the creation of zoning districts were submitted to and responded to by Marty Lambert, Gallatin County Attorney. Written and oral public comments were also taken and considered by the Subcommittee. Meeting notes including discussion, presentations and public comments can be reviewed at the Gallatin County Planning Department.

The Subcommittee submits this report of their research and recommendations, including a proposed process for the creation of new zoning districts in the county.

Please keep in mind that the recommended process is a policy recommendation to the County Commission and is not intended to promote or endorse zoning. It is described as a voluntary set of guidelines, to facilitate and accommodate those who wish to explore and proceed with the formation of a local zoning district.

This report is available on the Gallatin County web site (www.gallatin.mt.gov) and from the County Planning Department (www.gallatin.mt.gov/planning).

II. OVERVIEW OF ZONING IN MONTANA:

Legislative Authority: Two Montana statutes authorize the creation of zoning districts: MCA 76-2-101 and MCA 76-2-201 (see Appendix 5). They have significant differences. The major differences that concern the Subcommittee can be summarized as follows:

- 101 zoning requires a citizen-initiated petition process certified by the County Clerk and Recorder to initiate establishment of the zoning district; cannot “regulate lands used for grazing, horticulture, agriculture or the growing of timber”; and has an appeal (but not a protest) process after the zoning district has been created.
- 201 zoning can be initiated by the County Commission “for the purpose of promoting the public health, safety, morals and general welfare”; “may not prevent the complete use, development, or recovery of any mineral, forest or agricultural resources (except in specific circumstances); must be compliant with an adopted Growth Policy, and includes a protest process to prevent the adoption of a zoning district.

Subcommittee Views: It should be no surprise that the Subcommittee had divergent views throughout their work about the appropriateness and the values of zoning itself.

Some saw positive benefits such as giving local people a voice in how their community will evolve, providing developers and buyers some predictability, protecting areas from perceived threats caused by new development, and providing tools to protect open spaces, wildlife habitat and water resources.

Others saw creation of zoning districts as a strong threat to private property rights and values. They felt it should be used only as a legally appropriate tool to justify the constitutional exercise of police power that has a substantial bearing upon the public health, safety, morals or general welfare of the community.

The subcommittee has found considerable common ground and consensus in addressing issues concerning the fairness of the process of creating zoning districts. The Subcommittee had a unified voice on these general thoughts:

- Zoning is a tool to help implement the County Growth Policy, while protecting the general health, safety and welfare of the public and private property rights (as per requirements of 76-2-101 or 76-2-201 MCA).
- Zoning may significantly affect the residents of an area in a variety of ways, and therefore must be undertaken thoughtfully and inclusively.

- The process of forming a zoning district does not necessarily have to result in the creation of a zoning district to be successful; rather, success comes from the effort to explore community interests and vision.
- The process used in forming a zoning district needs to be fair, open and inclusive, allowing the constitutional opportunity for the right of participation of all affected freeholders and citizens.
- Formation of a zoning district needs to have significant support favoring the need for a zoning district.
- The process used by the South Cottonwood Zoning District had all the necessary elements of a fair process.

Relationship to Growth Policy: It is essential that any proposed zoning district be considered within a broader perspective to assure compatibility with neighboring freeholders and with the goals and objectives of the Gallatin County Growth Policy. Current Montana law requires only 201 zoning to comply with the Growth Policy, but all zoning proposals should incorporate consideration of impacts outside the proposed boundaries of a new zoning district.

Relationship to Neighborhood Plan: One method to achieve this broader consideration is described in the County Growth Policy as use of neighborhood plans. A neighborhood plan is the spatial link between the proposed new zoning district and the Growth Policy. It seeks to tie the specific details of the zoning district and its land use regulations to the broad goals and objectives of the Growth Policy. Such a plan can serve as the foundation for an area that could eventually contain one or more zoning districts in a compatible framework.

Interested persons may talk with the Planning Department staff for further information on the use of neighborhood plans as part of the zoning district formation process.

III. PARTICIPANT ROLES:

Zoning is a process involving several key participants. Understanding their individual and collective roles is critical to the success of the zoning process.

Freeholders: Freeholders play the leading role in deciding whether to establish a zoning district or not. Not only do they have a right to participate in the formation process (Article II, Section 8. Montana Constitution), but they also should drive the process. In order to do this successfully, they should:

- Commit to an open process and encourage broad participation by fellows;.
- Participate and be involved every step of the way of the zoning district formation process.
- Research the issues and educate themselves and community members.
- Be fair and open.
- Be organized and take responsibility.
- Consult citizens outside a proposed district but near enough to be impacted (see Neighborhood Plan, Section III).
- Realize they are playing a critical role in planning Gallatin County's future.
- Learn and consider using the recommended process for new zoning district formation included in this report.
- Meet with the County Planning Department and County Planning Board early in the process both to inform them of their interest in forming a zoning district and to seek their guidance

As electors of Gallatin County, freeholders select and entrust the operation of their county government to elected officials including the following:

County Commissioners: They initiate, adopt, or deny new zoning districts. As such, commissioners need to:

- Establish clear and equitable county policy in regards to the creation of zoning districts, consistent with state law.

- Confirm the intent that the New Zoning District process is offered to help citizens, but is not required.
- Assess the merit of a proposed zoning district as to compliance with the Gallatin County Growth Policy.
- Balance between needs and desires of citizens of the district and the broader community's long-range planning.
- Be available to citizens for guidance/direction.
- Support County staff with necessary resources to carry out adopted policy.

County Attorney: The County Attorney should be committed to the timely review of drafts of regulations. He/she is the legal bulwark that assures the rights of citizens are being upheld, the process meets Montana/County statutes, and the law is being followed.

County Clerk & Recorder: A critical role of the County Clerk & Recorder is to maintain land ownership records and certify the results of a zoning petition process in 101 zoning districts.

In addition to these elected officials, appointed advisory board members and professional staff play an important role in zoning. These include:

County and other Planning Boards: As advisors to the County Commission, the various planning boards represent the public and are the initial sounding board for the consideration of proposed zoning districts (required for 201 districts and recommended for 101 districts). The appropriate Planning Board needs to:

- Review new zoning district proposals, regulations and maps in depth, to encourage/ascertain whether the process has been fair and open, ensure compliance with the Gallatin County Growth Policy, and a balance of needs and desires of citizens in the district.
- Be a possible source of financial support.
- Make recommendations to the County Commission and the public.

County Planning Department: The County Planning Director and Department staff administer the Growth Policy, zoning regulations and related directives of the County Commission. They are involved in the process of forming zoning districts; and shall provide unbiased technical information, references, resource and application materials to citizens in a proposed zoning district. Additionally the Planning Department staff:

- Educate citizens about the steps of the zoning district formation process and serve as a clearinghouse for information (see Model Zoning Document, available at Planning Department).
- Organize and make available to the public all information related to a particular zoning effort (including land ownership/freeholder lists).
- Explain laws and regulations (e.g., the County Growth Policy and relevant state statutes).
- Facilitate the process as requested.
- At the direction of the County Commission and the County Planning Board, budget for anticipated and feasible zoning district support and involvement.

IV. GUIDELINES FOR ORGANIZATION AND MEETINGS

All new zoning district committees need to involve and inform everyone interested in and/or affected by the zoning district creation process, provide easy and clear access to information, and clarify expectations up front at every step. The goal of all committees should be to make the process fair, open, impartial and facilitative. The Subcommittee understands that each new zoning district committee will be unique, and strongly recommends they follow the organizational guidelines below as they proceed (See also Section V, Step 8).

Committee Leadership and Roles: Clear roles for leaders and participants in committees need to be established to clarify expectations for all.

Committee Leaders: Committees should have one or more leaders or chairs elected by the committee. The role of the leader or leaders should include the following:

- Conduct meetings openly and impartially.
- Keep meetings moving forward by use of facilitation skills.

- Encourage full participation and a fair and open process.
- Facilitate public input at pre-determined times.
- Assist the committee in enforcing rules of order.

Committee Secretary: There should also be a recorder (or secretary). The recorder should:

- Record key issues, discussion points and any decisions made by the committee.
- Maintain meeting notes for review by the committee and interested public.
- Provide copies of the meeting notes in a timely fashion.
- Receive and report public correspondence.

Committee Treasurer:

- To keep track of all financial records.
- Development of a preliminary and final budget for the entire process.

Other: Committees may also consider other leadership positions, such as an outside facilitator to conduct the meetings.

Committee Members: It is recommended that each Committee define expectations of participation for committee members. Committee members should:

- Understand their role at the start and agree to be committed to the process for the long haul.
- Be willing to be educated.
- Be an 'educator'/communicator with people in the district.
- Represent their area and disclose their own interests; they should understand they would have to regularly contact their district at large to explain what they are doing and be open about their actions.
- Be willing to listen to others' concerns and perspectives.

Planning Department Staff: Planning Staff will be available for technical and procedural advice. Although Planning Department attendance is not required, all groups are strongly encouraged to take advantage of this resource. (See County Planning Department role, Section III).

Meeting Operating Guidelines/Rules of Order: Each committee should establish operating agreements (see Appendix 2 for an example) to spell out their rules of order and procedure and to avoid conflict and misunderstanding. The following issues should be addressed:

Quorum size: For example, a quorum equals more than one-half of the committee membership and meetings that do not have a quorum should be canceled.

Role of committee members: Indicate the importance of committee members attending and participating in meetings, yet allow for flexible attendance; consider allowing for an ‘alternate’ to represent a member that can’t attend a meeting.

Decision-making: (Consensus or vote; a fair formula). Committees should seek consensus and fall back on voting or formalize by voting, where consensus cannot be reached. Consensus is much more powerful. Use polls periodically to determine barometer of issues and take votes for the record.

Record-keeping: Written records are critical. These include:

- Agendas, which can be changed to fit meetings;
- Minutes – written and recorded and made readily available to the public; and
- Expense records.

Role of Observers: Clarify expectations for observers at meetings: when they can speak, for how long, and how a record of their comments will be kept. We recommend that committees solicit input at the beginning and end of all public meetings. Committees can limit discussion of public, but the public should be informed and always invited.

Communication with Media: Clarify expectations for communicating with the media. Will there be a spokesperson for the group? Can an individual speak for the group?

Meeting Procedures: Clarify expectations for meeting procedures; use a process like Roberts Rules of Order (available at most bookstores) or at least summarize some key Roberts Rules of Order that would be useful.

Statute Requirements: Meetings must meet statute requirements. Montana statute requires public notices and agendas for public meetings and that the meetings include public comment and public hearing opportunities with the public inputs included in the official meeting minutes that are then available for review (see MCA 2-3-101 and MCA 2-3-203).

Meeting Schedule and Location: There should be regularly scheduled meetings (same time, same place, or with adequate notice of change); always open with public input invited. Notice of meetings can be posted on County Planning Department website.

Timeline: Committees should develop a fixed, but flexible timeline that shows the general sequence or anticipated chronology for their planning efforts. Such timelines help insure a fair and simple process for all affected freeholders, provide for advance notification of milestones and meeting schedules for new zoning district freeholders and constituents. Allow time for scheduling all necessary public hearings.

Work Outline: An outline for work should be developed and include:

- Formation of the new zoning district committee (see Section V, step 10);
- Creation of a mission or purpose statement in a visioning meeting (see Section V, Step 10);
- Definition of operating agreements, meeting procedures and a timeline (above);
- Education of committee members and the public with presentations, public involvement (see Public Involvement, Section VI) and review of the Resource Material (Section X) and Appendices (Section XI);
- Generation of options for recommendations and decisions;
- Exploration of underlying concerns about key proposals; seek common ground; be asking what concerns/issues are most important about certain issues and why;
- Final decision making;
- Drafting the proposed new zoning district regulation;
- Keeping the public informed and involved all along the way! And
- Presenting the proposal to a public hearing in front of the County Commission and/or Planning Board.

V. RECOMMENDED PROCESS FOR ZONING DISTRICT FORMATION

The Subcommittee believes it is critical and in the best interest of those involved to ensure a fair and diverse representation of all interests (including land use and land size) and freeholders within the entire proposed zoning district. The process of forming a zoning district committee and choosing its members must be fair, open and equitable to represent the interests of the area and to establish its legitimacy. It is important that all freeholders be contacted and informed to apply to and become involved in the zoning district committee.

How to Start the District Formation Process:

Typically, interested citizens begin the zoning district formation process in support of zoning to achieve their land use objectives or in reaction to perceived development impacts. The Subcommittee recommends that the initiating group take these steps:

- **Step 1: Draft preliminary district boundary.** It is important to set proposed district boundaries based on justifiable criteria. Visit with County Planning Department staff to discuss boundaries and obtain maps. Guidelines for developing these boundaries may include:
 - a. Specific reasons for creating zoning district.
 - b. Topography.
 - c. Road access and location.
 - d. Area of resource concern.
 - e. Other.

Keep interested members of the public informed of boundary establishment (see Public Involvement, section VI).

- **Step 2: Develop an informational mailing list** of all citizens and (freeholders) potentially interested and/or affected by the creation of a new zoning district.
 - a. Obtain a list of freeholders from the County Planning Department, which identifies property ownership, names and addresses of freeholders within and adjacent to the potential zoning district area.
 - b. List anyone else that may be interested.
- **Step 3: Mail preliminary information** to everyone on the mailing list informing them of the group's interest in and reasons for exploring formation of a new zoning district and inviting them to participate in a preliminary meeting where volunteers will be solicited to serve on a local zoning district committee.

- **Step 4: Meet with the County Planning Department** to review this proposal and to gather information on resources and materials available to assist with the process (see Section X, Resource Material, and Section XI, Appendices).
- **Step 5: Make appointments for preliminary meetings with the Planning Board and the County Commission** through the Planning Department to introduce the new proposed zoning district effort and solicit feedback (see Section X, Resource Material).

- **Step 6: Hold a preliminary meeting to inform the community** about the proposed zoning district effort, introduce the group of citizens initiating the effort, solicit diverse representation of volunteers to serve on the zoning district committee and solicit public input.

The Subcommittee also suggests the group:

- a. Use a neutral facilitator to conduct the meeting.
 - b. Keep records of attendees (add them to the mailing list), issues discussed, decisions made and next steps.
 - c. Keep records and receipts of expenditures, in case some expenditures may be appropriate for reimbursement (see Section X, Resource Material).
 - d. Make this information widely available using as many different means of public notice as possible (see Public Involvement, Section VI).
 - e. Actively seek volunteers to represent any target public or interests (have an informal application for new zoning committee members, including a short bio and how they represent freeholders in the area).
- **Step 7: Second mailing to freeholders.** The purpose of this second mailing would be to contact freeholders unable to attend either of the preliminary meetings and solicit their involvement in the process. This mailing would include:
 - a. Information from the first mailing.
 - b. A summary of the preliminary meeting.
 - c. Names of preliminary sub-committee members who volunteered at the meeting;.
 - d. Informal application for new committee members, including a short bio and how they represent freeholders in the area.
 - e. Conduct a straw poll to assess freeholder support for exploring the creation of a zoning district.
- **Step 8: Establish the new zoning district committee** of freeholders living within the proposed district. The new zoning district committee should be large enough to represent the diverse interests in the district, but small enough to get work done (9-13 members). Representation should include a cross-section of size and types of property owned, a diversity of land uses and location in the proposed district, and members representing all perspectives of land use issues.

~~The Subcommittee also suggests the County Commissioners consider the option of circulating the names and application information of applicants for a district-wide vote.~~

Need to add some more about electing committee members.

- **Step 9: Initial Visioning and Goal Setting.** The new zoning district committee should hold an initial visioning and goal setting meeting at the start of its work. (You cannot recommend something unless you know what it is for.) Invite interested people to be involved and encourage freeholder attendance by mailing, phone calls, etc. At this meeting, encourage participants to talk about what people value about living in their area, what their concerns are, and guidelines for considering a zoning district. Focus on the things everyone likes and agrees on. The vision and goals (also called “Intent and Purpose of the draft regulation document”) must be established by the entire group and represent the whole area.

A useful approach is exploration of options for zoning an area through a guided meeting with the use of facilitators, which helps to ensure that all feel free to speak at meetings. In summary:

- a. Vision—what do people value most about living in their area?
- b. Goals and Objectives (intent and purpose)—guiding targets for work, such as compliance with the County Growth Policy and state statutes, maintaining specific qualities unique to the area, setting a template for a neighborhood plan. [Goals = general targets to aim for; Objectives = specific action steps to take to achieve the desired goal].

To illustrate, the overall goal of the South Cottonwood Zoning District is:

“Balancing the rights of large and small property owners while creating a zoning district that maintains the rural residential and agricultural character of the existing neighborhood, protects the inhabitants from fire and other risks of high density, and plan for equitable future growth.”

- **Step 10: Draft zoning district regulations.** This is the body of the work of the committee (see Section VII for details).
- **Step 11: Freeholder Approval** (see Other Recommendations, Section IX, #1). At the conclusion of the committee’s work of drafting the zoning district

regulations, submit the regulations to the freeholders of the proposed zoning district for their endorsement and signature.

- **Step 12: Commission Review of Endorsement.** Endorsement results/responses will be submitted to the Commission with the proposed district map, the draft regulations, and the freeholder list. The commission will use this information to guide their decision about the proposed district.

The subcommittee recommends that, in order to help the Commission determine support for 201 districts, an endorsement of support for the zoning district be gathered from the district freeholders. This could be accomplished by an informal, still-verifiable, petition process where a ballot is mailed out with the final regulation to all freeholders and names in support of the process would be gathered. This endorsement would be presented to the Commissioners and this endorsement would be used as a gauge of community support for the district. The Subcommittee also cautions the Commission to recognize the protest threshold of 40% for 201 districts when evaluating this endorsement.

The Subcommittee strongly emphasizes the importance of continued and regular information sharing, solicitation and feedback from the community on specific issues, and widespread public notice, including boundary and regulation updates as they occur (see Public Involvement, Section VI).

VI. PUBLIC INVOLVEMENT/NOTIFICATION/EDUCATION

As has been stressed throughout this report, the Subcommittee finds it imperative to have a fair, open and inclusive process in zoning district formation. Doing this necessitates a strong and comprehensive public involvement effort. The goal is to give everyone affected an opportunity to participate in the public process, to learn about and provide input on the issues addressed in the proposed regulations, and to avoid surprises for anyone reading the proposed regulations at the end of the process, just before the public hearing.

Identification of Target Public: Any group initiating a new zoning district should develop and maintain a contact/ mailing list (e.g., names, addresses, phone, email) of interested citizens, including:

- All freeholders in the proposed zoning district area (available from the County Planning Department).
- Local residents.
- Freeholders adjacent to the proposed zoning district area (available from the County).
- Interested general public.
- Interested officials (County Commission, County Planning Board).

Legal Public Notices: The County Attorney is presently awaiting the outcome of a complaint regarding legal public notice. It is unclear at this time what constitutes sufficient “legal” notice.

Public Information Options: Each committee should review the variety of public information options available and select as many means as possible to accomplish a thorough public information effort. Some techniques found to be successful:

- District wide mailings (letters and post cards).
- Phone calls and phone trees.
- Web sites and email.
- Presentations at local property/homeowner association meetings.
- Flyers distributed in neighborhoods and public areas.
- Periodic newsletters providing updates on progress and direction.
- Legal ads.
- Notice of upcoming meetings and events in daily newspapers (e.g., “Area Briefs” in the Bozeman Daily Chronicle).
- Letters to the editor or op-ed pieces.
- Articles in the newspaper – contact reporters.
- Open public meetings.
- Phone number contacts for committee members.

Meeting Location and Times: Setting regular meeting times at the same location greatly improves public involvement.

Education: People involved and interested in the exploration of the zoning district formation need to be educated about the zoning district process and about the issues driving the process. This should be an ongoing effort. Education should include:

- Public meetings.
- Public notice and involvement (above).
- A thorough review of the materials listed below in the Resource Material and Appendices sections (Sections X and XI).
- County planning staff presentations to discuss tools, state statutes, the County Growth Policy, these guidelines for zoning district processes.
- Speakers to talk about visioning topics.
- Speakers from other districts.
- Experts on wildlife, water, natural resources, subdivision, commercial uses, economists and other people related to a specific issue.

VII. DRAFTING OF THE ZONING REGULATION

The drafting of a zoning regulation for a proposed new zoning district occurs after obtaining education, guidance and information from the variety of sources discussed above and reviewed in the following Resource Section and Appendices (Section X and XI). These resources will help customize proposed zoning regulations to a specific area/district. Again, this Subcommittee stresses the importance of having a fair, open and inclusive process.

In general, the zoning district regulations should demonstrate a concern that the police power justification for zoning districts be limited by a “compelling need that has a substantial bearing on the public health, safety, morals, and general welfare of the community” as the 2004 Montana Supreme Court ruled.

Steps to drafting the regulation may include:

1. Review Initial Goals and Objectives, including land use goals.
2. Explore freeholder response to issues to seek commonality.
3. Review the 101 and 201 statutes to understand their different approaches and applications. (For example: how they are formed; petition requirements; protest process or not; administration; resource control or not). Freeholders should know the scope and processes involved in both types of districts and choose which is best for them.
4. Identify major components of potential zoning to achieve goals/objectives and resolve and define land use issues as much as possible. These often include:
 - Density, guided by the purposes and goals of the zoning district committee and including criteria for such things as topography, wildlife habitat, migration, watershed, view shed, balance with fairness to freeholders, compliance with Growth Policy (see Resource Material, Section X).
 - Major land use objectives (principal/permitted, conditional, non-conforming uses) (See Definitions, Appendix 7).
5. Review the model zoning regulation (Appendix 7) and consider using it as a foundation for the initial draft regulation. Incorporate the sections that apply to the proposed zoning district. This will help provide continuity for administration of various zoning districts
6. Conform to County Growth Policy.

7. Consider the use of established land use tools: for example, clustering, TDRs, CUPs, non-conforming uses, performance zoning, etc. with assistance from the Planning Staff (see Tools for Use in Resource Material, Section X).
8. Review initial draft with the public to guide further revision.
9. Keep everyone informed along the way. Support is essential!

VIII. PRESENTATION OF PROPOSED ZONING REGULATION

When the draft zoning regulation has been completed, the committee needs to present this proposal in public hearings first to the Planning Board*¹) and then to the County Commission for their approval or denial of the new zoning district. The presentation needs to demonstrate the specific nature of the proposed district, and should include these elements of information:

- An introduction that includes a brief history of the zoning effort and the goal of the process.
- A detailed description of the Process which includes information about the formation of the zoning committee, the timeline of events in drafting the regulation, and pertinent information about the petition process (as required by 101/201 districts).
- A detailed overview of the Proposal including Boundaries, Density and overall goal of land use proposals, offering specific details to demonstrate these goals.
- A description of the Vision of the specific environment, present and future.
- The Objective or the Intent and Purpose of the proposed district specifically as it complies the Gallatin County Growth Policy.
- Maps as visual aids to clarify boundaries, density, and future buildout; freeholder support and opposition; other maps possibly including diversity of committee membership, parcel size, and location.

The committee members will share the responsibility of presenting this proposal with assistance from the Planning Department staff member who attended the meetings.

A successful example of an outline used is included in Appendix 9.

¹ State Statute only requires this for 201 districts.

IX. OTHER RECOMMENDATIONS

In addition to the recommended process for new zoning district formation, the Subcommittee offers the following specific recommendations to the Commission:

- The Subcommittee feels that it ensures a fair process and supports the intent of citizen-initiated zoning to show freeholder support of the process before the Commission approves a zoning district, so that zoning does not occur without support of a solid majority of the freeholders and so that, as in 101 zoning, a protest period may not be necessary. It also satisfies the freeholders that a zoning district has strong enough support so that a protest challenge would not succeed.

Therefore, the Subcommittee recommends that the County Commission base their decision recognizing the protest thresholds for 101 and 201 districts (MCA 76-2-101(5) and 76-2-205(6)).

- The Subcommittee strongly recommends that the County Commission and the County Planning Board allocate new zoning district support workload to the County Planning Department within the means of the Department's work plan as feasible in terms of staff time and budget.

X. RESOURCE MATERIAL

A. Gallatin County Commissioners:

- Bill Murdock, Chairman
- Joe Skinner
- John Vincent

B. Gallatin County Planning Board Members (as of November 2005):

- Mike Milmine, President
- Eugene Krebsbach, Vice-President
- Mary Jacobs
- C.B. Dormire
- Donald Seifert
- Matt Flikkema
- Deb Kimball Robinson
- Gail Richardson
- Martha Biel
- Kerry White

Planning Department Contact: 582-3130

Office: County Courthouse, 311 W. Main, Room 208

C. Resource Maps:

- Population density
- Agricultural land
- Seasonal high water tables
- Ungulate winter range and riparian areas;
- Parcel data;
- Roads;
- Public lands;
- School districts;
- Fire districts;
- Subdivision maps;
- Other information available through the Local Water Quality District (<http://www.co.gallatin.mt.us/GLWQD/index.htm>); and
- Gallatin County Geographic Information Systems Office (<http://www.co.gallatin.mt.us/GIS/index.htm>).

D. Sources of Outside Assistance (ALL TO FILL IN)

E. Funding Options

- *Although there may be advantages in having mailings come directly from the citizens supporting the effort to explore a new zoning process, mailing support from the County may be available in terms of minor funds or use of the County's bulk mailing process.*
- A small amount of funding from the County Planning Board (or other planning jurisdiction) may be available, upon request.
- Aside from staff support from the County Planning Department, be aware that zoning district committees may be responsible for much of their own fundraising. *Keep receipts in case some reimbursement is appropriate.*

F. Tools for Use (PLANNING DEPT TO FILL IN)

- Conservation Easements and purchase of development rights – Mike Harris, Open Lands Board Coordinator
 - Phone: 582-3278
 - Office: County Courthouse, 311 W. Main Street, Room 304
 - <http://www.co.gallatin.mt.us/openlands/index.htm>
- Use-by-right vs. Conditional Use Permits.
- Cluster zoning.
- Large-lot zoning/agricultural districting.
- Performance zoning.
- Transfer of development rights

G. Meeting Places (ALL TO FILL IN)---possible sites, capacity, contact information

XI. APPENDICES

1. List Of Subcommittee Members
2. Subcommittee Operating Agreements
3. Subcommittee Meeting Notes
4. Public Comment Received
5. Relevant Montana Statutes and County Policy
 - 101 statute
 - 201 statute
 - Growth Policy
6. County Attorney's Responses to Legal Questions from the Subcommittee
7. Model Zoning Regulation (See Planning Department)
8. Existing Zoning District Regulation Examples (See Planning Department)
9. Example of the presentation outline used by South Cottonwood Zoning District.

APPENDIX 1: LIST OF SUBCOMMITTEE MEMBERS

Subcommittee Members:

**Dale Beland
Ann Bertagnolli
Martha Biel
Melissa Blessing
Patricia Davis
Tina Deweese
Valorie Drake
Dan Griffing
Mary Jacobs
Sandy Maher
Mike Milmine
Jennifer Read
Gail Richardson**

Community Mediation Center Facilitators:

**Louise Forrest
Mary Ellen Wolfe**

Planning Department Staff:

**Jennifer Madgic (Planning Department Director)
Warren Vaughan
Dawn Chretien**

APPENDIX 2: OPERATING AGREEMENTS

OPERATING AGREEMENTS FOR GALLATIN COUNTY'S NEW ZONING DISTRICT SUBCOMMITTEE (March 2005)

PURPOSE

The purpose of the New Zoning District Sub-Committee is to prepare recommendations with respect to the process for creating new County zoning districts. Sub-Committee members shall research zoning efforts currently underway, as well as those of the past, to help determine effective guidelines for citizens to utilize as they contemplate forming a new zoning district. The Sub-Committee shall prepare a written report, with a public presentation of such findings before the County Commission.

ROLES AND RESPONSIBILITIES

Sub-Committee Members

Each member of the Sub-Committee is expected to:

- Attend meetings
- Keep open mind and commit to cooperative problem solving
- Take responsibility to monitor mediator's process.

Sub-Committee members who represent constituencies are expected to:

- Report to constituents
- Encourage and facilitate communication with constituents and request feedback.
- Listen and articulate views of constituents to Sub-Committee.

Communication between Meetings:

The issue of communication between meetings will be addressed by the Sub-Committee as the issue arises.

Constituents

Constituents of Sub-Committee members are expected to stay informed of about the process via Sub-Committee representatives and offer feedback to the Sub-Committee in the form of questions, suggestions, etc.

Alternates

Some community members have been attending meetings as “alternates.” These individuals may replace an existing Sub-committee member if that member must resign. This would require County Commissioner approval, notarization and swearing in. Alternates are currently considered members of the public. They are invited to listen and may speak during the assigned public comment period.

Observers

Approximately five minutes will be provided at the beginning and end of each meeting for observer comments. Observers are invited to participate at the assigned times, as noted on the meeting agenda. Observer comments will be kept brief and to the point.

Facilitators

The role of the facilitators is to design and disseminate agendas (striving for two days ahead of meetings), conduct meetings while assisting group members to be at their participatory best, keep track of meeting notes on flip charts (all participants are requested to assist in making sure facilitators capture correct and complete information) and disseminate the notes (striving for two days ahead of meetings). The facilitators are responsible to the whole group and not to one member or interest and will remain impartial to the substance of issues under discussion. The facilitators will assist and work with the group to adhere to its Operating Agreements. The facilitators will keep the comments of observers brief and to the point, limiting the observer comment period to approximately 5 minutes at the beginning and end of meetings.

Staff

Gallatin County Planning Staff are expected to: set up the meeting room; do research, as necessary, to support Sub-Committee work; do public mailings, as necessary; and act as the liaison to handle communications between the Sub-Committee, Planning Staff and County Commissioners.

Proxies

There are no proxies, unless or until the Sub-Committee chooses to revisit the issue, if needed.

DECISION-MAKING

The Sub-Committee will work to achieve consensus first (to an undetermined point) until the group decides a vote is necessary. When a vote is determined necessary, a quorum is 2/3 of the voting members and more than 1/2 of voting members must vote in support to pass a recommendation. If there are issues that the Sub-Committee members cannot resolve through consensus decision-making, they will summarize the issue and fully document the remaining differences, including the specific concerns of individual stakeholders. When the final recommendations of the Sub-Committee are prepared, a minority report will be appended if consensus on all recommendations is not achieved. The minority report will include specific concerns of individual stakeholders. The Sub-Committee will revisit this issue when developing the recommendations.

Additionally, the Sub-Committee will:

- Make decisions in a timely manner;
- Obtain as much support for decisions as possible;
- Acknowledge minority concerns;
- Set a time limit for the process;
- Be cognizant of the associated costs.

MEETING PROCEDURES

Sub-Committee meetings will use a facilitated process in which the facilitator gives attention to time, consensus and keeping the process on track.

COMMUNICATIONS WITH THE MEDIA

No one person speaks for the Sub-Committee unless the group designates that person. Sub-Committee members may speak to anyone as an individual, but they do not speak for the group.

COMMUNICATIONS WITH THE PUBLIC

Sub-Committee meetings are open to the public. The Sub-Committee allows and encourages input from zoning committees and the public by posting notice of meeting announcements on the County's web site. The Sub-Committee will conduct a special public meeting when the Sub-Committee's draft recommendations are ready to provide opportunity for public input and response. The Public Meeting will be posted and noticed on the County's web site and in the newspaper.

SUB-COMMITTEES

If the need to develop sub-committee's arises, the group will develop procedures as needed.

DISCUSSION GUIDELINES

The following guidelines encourage productive Sub-Committee dialogue. Members of the Sub-Committee will commit to 'best efforts' at following them and will give the facilitators the authority to enforce them.

- It is crucial that everyone have a chance to be heard and to hear others. Therefore:
 - Listen with Respect--avoid side conversations.
 - Take turns speaking--avoid interruptions.
 - Speak with respect – and when speaking, be brief.
 - Make sure we hear and discuss thoroughly without pressure to decide.
 - If something has been said, don't repeat it, but acknowledging it is okay.
- It is important to find creative, innovative solutions. Therefore,
 - Avoid judging ideas prematurely.
 - Look for the need that gives rise to the idea.
 - Look for ways to improve proposals.
 - Try to remain open minded.
 - Focus on the distinctions between different options.
 - Recognize commonality among different players.
- Disagreement is inevitable, but must be focused on the issues involved rather than on one another. Therefore,
 - Avoid competitive behavior that denigrates other participants.
 - Avoid behavior that is disruptive to the work of the group.
 - Address one another in a respectful way.

APPENDIX 3: SUBCOMMITTEE MEETING NOTES

Currently available at Planning Department; will be included in final report.

APPENDIX 4: PUBLIC COMMENT

Currently available at Planning Department; will be included with final report.

APPENDIX 5: RELEVANT MONTANA STATUTES AND COUNTY POLICY

76-2-101. Planning and zoning commission and district. (1) Subject to the provisions of subsection (5), whenever the public interest or convenience may require and upon petition of 60% of the affected freeholders, the board of county commissioners may create a planning and zoning district and appoint a planning and zoning commission consisting of seven members.

(2) A planning and zoning district may not be created in an area that has been zoned by an incorporated city pursuant to [76-2-310](#) and [76-2-311](#).

(3) For the purposes of this part, the word "district" means any area that consists of not less than 40 acres.

(4) Except as provided in subsection (5), an action challenging the creation of a planning and zoning district must begin within 5 years after the date of the order by the board of county commissioners creating the district.

(5) If freeholders representing 50% of the titled property ownership in the district protest the establishment of the district within 30 days of its creation, the board of county commissioners may not create the district. An area included in a district protested under this subsection may not be included in a zoning district petition under this section for a period of 1 year.

76-2-201. County zoning authorized. (1) For the purpose of promoting the public health, safety, morals, and general welfare, a board of county commissioners that has adopted a growth policy pursuant to chapter 1 is authorized to adopt zoning regulations for all or parts of the jurisdictional area in accordance with the provisions of this part.

(2) For the purpose of promoting the public health, safety, morals, and general welfare, a board of county commissioners that adopted a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may, until October 1, 2006, adopt or revise zoning regulations that are consistent with the master plan.

Growth Policy: To be included in final report.

APPENDIX 6: COUNTY ATTORNEY RESPONSES TO LEGAL QUESTIONS FROM THE SUBCOMMITTEE

Legal Questions for the Gallatin County Attorney From the New Zoning District Sub-Committee

1. Can the county zone public land?

New legislation (HB 450) does not specifically address this question. However, concerning lease or sale of state land, it requires leasing by the State Land Board to ‘...implement review criteria in consideration of...local government provisions...zoning regulations’ and sale of state land to ‘...consider the...resolutions of the appropriate county regarding...zoning regulations.’ (Early versions of the bill would have required the Board to ‘...comply with..’) So where does this leave us?

Title 76, Chapter 2 Montana Code Annotated does not address the issue of whether U.S. lands or State lands not in private ownership may be included within zoning districts. Therefore those lands may be included within 101 and 201 zoning districts.

Regarding HB 450 - according to the most recent version of the Bill (last updated April 8, 2005 at 8:58 a.m.) the bill amends §77-2-310, MCA, as follows:

- (1) Any part of state lands that in the opinion of the board may be sold for residential or commercial purposes must before sale, at such time as the board may consider to be in the best interests of the state, be surveyed in conformity with the laws of the state for the survey and platting of townsites and additions. Except to the extent that the following provisions violate Article X section 4 or 11, of the Montana constitution, the board and the department shall consider the ordinances of the appropriate city or town or the resolutions of the appropriate county regarding
 - (a) a growth policy or a neighborhood plan adopted pursuant to Title 76, chapter 1;
 - (b) zoning regulations;
 - (c) subdivision review as provided in Title 76, chapter 3;
 - (d) annexation;
 - (e) plans for the extension of services; and
 - (f) other actions related to local planning.

If this part of HB 450 is law (the web site states the Governor signed the bill on April 21, 2005 and the effective date is July 1, 2005) then HB 450

recognizes that the disposition of state lands should be consistent with county zoning and planning.

a. Also much of Gallatin County is federal land. How does that work?

The basic issue is the inclusion of public land where there are not freeholders and, thus, the skewing of the voting land base for petition and for protests.

As there are no freeholders or individual titled property owners for U.S. lands or for State lands not in private ownership, there can be no skewing of the petition or protest process.

60% of affected freeholders are needed for a petition to create a 101 zoning district, and certain percentages of the freeholders or titled property owners are needed to protest zoning district formation, so any lands not held by freeholders or titled owners should not be included for the purposes of judging sufficiency of a petition or of a protest to formation of a zoning district.

b. Is public land considered in the petition or protest process?

See the above discussion.

2. Must all land in a proposed zoning district be contiguous? What about state and federal lands that break contiguity?

The issue of whether property must be contiguous to be included within 101 or 201 zoning districts is not addressed in Title 76, Chapter 2. Therefore non-contiguous lands may be included within such zoning districts.

3. Does 201 zoning provide the same opportunities for regulation of potential impacts as 101 zoning? If not the same, what are the differences?

There is one significant difference involving the natural resources existing with the proposed district. 101 Zoning Districts are governed by the following:

76-2-109 - Effect on natural resources.

No planning district or recommendations adopted under this part shall regulate lands used for grazing, horticulture, agriculture, or the growing of timber.

By way of contrast, 201 Zoning districts are limited to the following regulations:

76-2-209 - Effect on natural resources.

(1) Except as provided in 82-4-431 and 82-4-432, a resolution or rule adopted pursuant to the provisions of this part, except 76-2-206, may not prevent the complete use, development, or recovery of any mineral, forest, or agricultural resources by the owner thereof.

(2) The complete use, development, or recovery of a mineral by an operation that mines sand and gravel and an operation that mixes concrete or batches asphalt on a site that is located within a geographic area zoned as residential are subject to the zoning regulations adopted under this chapter.

Thus, 101 districts may regulate mineral development. For all practical purposes 201 districts may not, because 201 districts cannot prevent “the complete use, development, or recovery of any mineral, forest, or agricultural resources by the owner thereof.” The case of *Missoula County v. American Asphalt, Inc.*, (1985) 216 Mont 423, 701 P.2d 990, illustrates this point, as does 36 A.G. Op. 33 (1975).

a. Are certified petitions currently required for 201 districts?

As our Growth Policy is currently constituted, yes.

4. The Citizen Committee effort of acquiring the legal names of freeholders in the proposed districts has been a nightmare to the folks who've volunteered for this task. Can this information be made more easily available with the assistance of the planning Department for the purpose of gathering petition signatures?

The names and addresses of free holders owning any parcel of land are in the public record that is available at the County Clerk and Recorders office or online through the County internet website. However, obtaining a list of every freeholder in a large proposed zoning district is a difficult, costly and time-consuming job involving several man-days of work and specific knowledge of going through county records or extracting data from an internet computer website database. The county planning department has stated that they can obtain a full list of freeholder names and addresses from any proposed zoning district region in as little as 15 minutes. The county planning department uses its access to proposed zoning district freeholders to advance its program to create zoning districts. The planning department has stated that it cannot make the mailing list of proposed zoning district freeholders available to zoning district opponents to distribute their literature or to solicit petitions to challenge the formation of the zoning district. This use of the readily available freeholder mailing list by the planning department to support a zoning district, combined with their refusal to let it be used for the legitimate petition challenge to the zoning district gives the county an unfair advantage and puts an unfair burden on the

freeholders to have a fair, timely and informed opportunity to challenge the formation of the zoning district in denial of their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency, per 2-3-101, MCA.

Although there is a statute that appears to prohibit the dissemination of such mailing lists, §2-6-109, MCA, two Attorney General opinions, 38 A.G. Op. 59 (1979); and 43 A.G. Op. 73 (1990) establish that the custodian of the documents in question must balance the privacy interests involved with the public's right to know about governmental affairs.

My understanding is the mailing lists contain only the name and address of the citizen or freeholder. If so, only minimal privacy interests of the affected landowners are implicated by the dissemination of the mailing lists.

On the other hand, as the lists were apparently used to poll citizens or freeholders as to their beliefs about zoning, or to keep citizens or freeholders apprized of the potential creation of a zoning district, there is considerable merit to the public disclosure of such lists. Thus, the privacy interests of the citizens or entities involved do not clearly exceed the merits of public disclosure of such limited information.

I therefore conclude the lists should be disclosed to the public.

6. Can the planning department legally withhold freeholder mailing list information (which is compiled from public records by the county paid employees) from the opponents (or supporters) of zoning districts? If so, under what specific statutes is the planning department forbidden from letting tax paying members of the public from obtaining the lists of freeholders?

See the answer to question no. 5 above.

7. There seem to be two different systems for counting the vote for petitions and protests. Can these ways be reconciled and made consistent and comprehensible to all interested parties?

- a. Is it one freeholder, one vote?
- b. What is the legal requirement for signature?

I put this question to Clerk and Recorder Shelley Vance, and she offers the following, with which I agree:

There are two different systems for counting the vote. One is for creating the petition [76-2-101 (1)] and one is for protesting the creation [76-2-101 (5)]. In section 1, a freeholder can be one person. If a husband and wife jointly own the

property each gets a say. The big difference (and where the confusion sets in) is in subsection 5. Yes, these are still freeholders, but they must represent 50% of the titled property ownership. I think that is where people get confused. No one has explained the difference between creating and protesting. . . . In order to represent 50% of the titled property ownership you must have all freeholders of that property sign. . . .

As far as legal requirements for signature, we prefer that people sign petitions exactly how they own title to the property. However, we have counted names if we can determine that they are the same person e.g. a nickname signed instead of their formal name listed on the deed - Robert v Bob. I am not aware of any statute on legal requirements for signatures. The committee might be searching for answers to questions about property owned by a Corporation, Trust, LLC, LLP, etc. and what the requirements are to represent a voice of that entity. I suggest that we just list those out: When a person is signing on behalf of a corporation it must be the President....When a person is signing on behalf of a Trust it must be the Trustee.....etc. There should be some type of representation that "Shelley Vance in the President of the corporation".

I would add that the composition of protesters is different for 101 and 201 districts: for 101 districts, the protesters are “ freeholders representing 50% of the titled property ownership in the district,” §76-2-101(5), MCA.

For 201 districts the protesters are “40% of the freeholders within the district whose names appear on the last completed assessment roll or if freeholders representing 50% of the titled property ownership whose property is taxed for agricultural purposes . . . or whose property is taxed as forest land . . . ,” §76-2-205(6), MCA.

8. Does the current 50-60% legal petition requirement that appears in the Growth Policy on the County’s web site apply?

Yes.

9. Given the discretionary nature of the 76-2-201, MCA statutes, is it not legal for the commissioners to use their discretion to enact legally binding county resolutions (laws) placing additional requirements on the creation of the zoning districts, especially when these requirements are intended to protect the property rights of those freeholders who would be otherwise adversely affected by the creation of the zoning districts?

Background: Gallatin County passed a resolution to require legal petitions signed by 60% of the freeholders representing 50% of the private land in order to form a 76-2-201, MCA zoning district. In following the requirements of this resolution the 60%/50% petition requirement was incorporated into the Gallatin County Growth Policy as a legal requirement for the formation of all 201 zoning districts within the County.

The County Attorney has advised the removal of these petition requirements but has not stated that the petition requirements are illegal. The 76-2-201, MCA statutes authorize the creation of zoning districts and state that the county commissioners may create them.

Gallatin County does not have self-governing powers. Gallatin County is therefore a government of limited powers, meaning it has only those powers expressly given to it by the Legislature and those powers that may be reasonably implied from the Legislature's express grants of power.

Given this limitation, Gallatin County does not have the authority to change state statutory procedural requirements for creation of zoning districts. Because the statutes that govern the creation of 201 districts make no mention of a petition, Gallatin County may not impose a petition requirement for creation of a 201 zoning district.

It is the application of this indefensible petition requirement that concerns me, not the mere fact that it currently is part of Gallatin County's Growth Policy. The application of this petition requirement may allow an aggrieved party to a zoning district dispute to bring a successful lawsuit against the County.

10. Please give us your opinion and interpretation of state statute regarding the process of and criteria for establishing an interim emergency zoning district. (What is the legal basis for forming Emergency Interim Zoning Districts per 76-2-206, MCA? What constitutes a valid, legal emergency as opposed to a stop-gap employed to give planning advocates more time in the face of inadequate public support to meet the petition requirements for their zoning district?)

The statute explicitly sets forth the requirements for interim or emergency zoning:

76-2-206 - Interim zoning map or regulation.

- (1) The board of county commissioners may adopt an interim zoning map or regulation as an emergency measure in order to promote the public health, safety, morals, and general welfare if:
 - (a) the purpose of the interim zoning map or regulation is to classify and regulate those uses and related matters that constitute the emergency; and
 - (b) the county:
 - (i) is conducting or in good faith intends to conduct studies within a reasonable time; or
 - (ii) has held or is holding a hearing for the purpose of considering any of the following:
 - (A) a growth policy;
 - (B) zoning regulations; or

(C) a revision to a growth policy, to a master plan, as provided for in 76-1-604(6) and 76-2-201(2), or to zoning regulations pursuant to this part.

(2) An interim resolution must be limited to 1 year from the date it becomes effective. The board of county commissioners may extend the interim resolution for 1 year, but not more than one extension may be made.

If I learn of the specific circumstances of a proposed interim zoning district I can then give an opinion on whether a valid emergency exists. I offer the Subcommittee two recent examples where I was asked for an interpretation of this statute.

The interim Bozeman Pass zoning was, in my opinion, a valid use of this statute. There were inadequate conditions governing the CBM exploration slated for the area and the interim zoning was needed to protect the area's citizens. The interim zoning provided two years in which to work toward adoption of citizen-petitioned zoning in the Bozeman Pass area.

With regard to the Bridger Bench area, however, the Commission had complete control over future subdivision in that area. As the Commission could protect public welfare through subdivision law, no valid emergency existed. The Bridger Bench Interim District was not, in my opinion, a valid use of interim or emergency zoning.

11. Does state statute address non-conforming use? There seems to be much fear and defensiveness for a designated status of Non-Conforming Use. Is there a way to alleviate some of this fear by employing the CUP process for specified needs of expansion and growth? Tell us about different options for appeals regarding Non-Conforming Uses?

Most zoning ordinances provide that any lawful use that existed before the adoption of zoning may continue as a "non-conforming" use. *Land Use Planning and Development Regulation Law*, §4.31, Juergensmeyer and Roberts, West Publishing (2003). According to *Land Use Planning*, there are four general types of recognized non-conformances: 1) nonconforming buildings; 2) conforming uses of non-conforming buildings; 3) nonconforming uses of nonconforming buildings; and 4) nonconforming uses of land.

Also according to §4.31, *Land use Planning*, "Protection of existing uses was an important goal from zoning's onset." See also the Montana Supreme Court case of *Alden v. Board. of Zoning Comm'rs* (1974), 165 Mont 364, 367-8, 528 P.2d 1320, where the Court held that a failure to respect a prior non-conforming use was "unreasonable and discriminatory."

The Legislature recognizes that non-conforming uses should be allowed:

76-2-105 - Continuation of prior nonconforming uses.

Existing nonconforming uses may be continued although not in conformity with such zoning regulations.

76-2-208 - Continuation of nonconforming uses.

Any lawful use which is made of land or buildings at the time any zoning resolution is adopted by the board of county commissioners may be continued although such use does not conform to the provisions of such resolution.

Thus, I see no reason to require an owner of land with a prior non-conforming use to apply for a conditional use permit.

§76-2-110 and §§76-2-226 and 227, MCA, govern appeals from CUP decision or other zoning administrative decisions.

12. Are all zoning district formation committee meetings (whose members are selected by the county commissioners and whose meetings are attended and directed by paid county planning department staff members under the directions of the County Commission) covered by the MT Open Meeting statutes? Is public notice required for these meetings?

Yes.

13. Is this New Zoning District Sub-Committee covered by the Open Meeting Statutes? Are we complying with the statutes without having publicly noticed meetings?

Background: Open meetings in Montana are covered by the 2-3-101, MCA statutes and guarantee the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency. Per 2-3-203, MCA the Open Meeting laws apply to any committee or subcommittee appointed by a public body and apply to all meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds. Montana statutes require public notices and agendas for public meetings and that the meetings include public comment and public hearing opportunities with the public inputs incorporated into the official meeting minutes that are made available to the public for review.

Yes, and no.

14. Is public notification required for the entire County or simply freeholders in a district?

The answer basically is that notification must be made to the entire County.

For steps leading to the Commission's declaration of a new 101 district, the Commission need only follow its general notice process regarding its public meetings. As I understand it, the process is as follows: the Commission's agenda for the following week's Tuesday meeting is approved on Monday the week before the meeting, and the agenda is then published in the Chronicle on Friday; for the Wednesday afternoon regular meeting, the agenda is approved on Wednesday the week before the meeting, and that agenda is published in the Chronicle on Sunday.

Any written item must be in the Commission packet two business days ahead of the Commission's regular meeting.

The process is different for new 201 districts and for interim zoning districts. There, the requirements of §7-1-2121 apply:

7-1-2121 - Publication and content of notice -- proof of publication.

Unless otherwise specifically provided, whenever a local government unit other than a municipality is required to give notice by publication, the following applies:

(1) Publication must be in a newspaper meeting the qualifications of subsections

(2) and (3), except that in a county where no newspaper meets these qualifications, publication must be made in a qualified newspaper in an adjacent county. If there is no qualified newspaper in an adjacent county, publication must be made by posting the notice in three public places in the county, designated by resolution of the governing body.

(2) The newspaper must be:

(a) of general paid circulation with a periodicals mailing permit;

(b) published at least once a week; and

(c) published in the county where the hearing or other action will take place.

....

(5) The notice must be published twice, with at least 6 days separating each publication.

(6) The published notice must contain:

(a) the date, time, and place of the hearing or other action;

(b) a brief statement of the action to be taken;

(c) the address and telephone number of the person who may be contacted for further information on the action to be taken; and

(d) any other information required by the specific section requiring notice by publication.

(7) A published notice required by law may be supplemented by a radio or television broadcast of the notice in the manner prescribed in 2-3-105 through 2-3-107....

Thus, a hearing on the resolution to create a new 201 district or interim zoning district must be published twice, with at least six days separating the publications, in a newspaper of general circulation.

Other than the notice requirements discussed above, the County is not required to notify affected freeholders or property owners within a proposed zoning district.

15. What is required to show a violation of Open Meeting Statutes?

That would depend upon the facts and circumstances revealed through an investigation of a particular complaint.

16. Is a *willful and knowing violation* of the Open Meeting Laws also a criminal offense of Official Misconduct per 45-7-401(1)(a) and (e), MCA?

- a. If so, please clarify who is applies to.
- b. Can appointed members of zoning district committees be held legally responsible?

That would depend upon the facts and circumstances revealed through an investigation of a particular complaint.

Please recall that subsection (1)(e) of §45-7-401, Official Misconduct, was declared unconstitutional by the Supreme Court in *St. v. Conrad* (1982), 197 Mont 406, 412-13, 643 P.2d 239. Although Conrad was decided in 1982 the Legislature has never addressed this problem.

Official Misconduct may be committed by a “public servant” and that term is defined in §45-2-101(63):

"Public servant" means an officer or employee of government, including but not limited to legislators, judges, and firefighters, and a person participating as a juror, adviser, consultant, administrator, executor, guardian, or court-appointed fiduciary. The term does not include witnesses. The term "public servant" includes one who has been elected or designated to become a public servant.

It is somewhat of a stretch but it is possible to construe this definition so that an appointed member of a zoning district committee is “designated” as a public servant.

17. Are the recent Montana and U.S. Supreme court property rights cases relevant to the creation of zoning districts and zoning district regulations [e.g. *Nollan v California Costal Commission* US 1987, *Lucas v S Carolina Costal Council* US 1992, *Dolan v Tigard* OR US 1994, *Yurczyk v. Yellowstone County*, Montana Supreme Court, 2004 (02-062)]

It is possible to create hypothetical situations where any or all of these cases might bear on some legal issue engendered through the creation of a zoning district.

18. At the present time it is my understanding that if a zoning area does not list a use that they do not want within the zoned area that the use cannot be done. Example: if an asphalt batch plant is not wanted within the area and is not listed in the uses by right and the conditional uses, therefore it is implied that a batch plant cannot be place within the zoned area.

If there is nothing said in a Zoning area document, such as the above example, what in the future stops the possibility of someone wanting to do a use coming and saying “It doesn’t say anything about the use I want to do; therefore I must be able to do it.”

This is a very good question. I cannot answer such a question without reference to a particular ordinance and a particular controversy surrounding a proposed use under that ordinance.

I find that §4.2B, *Land Use Planning and Development Regulation Law*, Juergensmeyer and Richards, West (2003) offers some guidance:

Since it would take an imaginative drafter a long time to list every conceivable compatible use, in many ordinances the permitted use list will close with language such as “and any other similar uses.” Even if the phrase is not in the ordinance, the building inspector or other administrator or administrative body may be given authority expressly or by practice to permit similar uses. Whether a particular use is similar to a use listed in the ordinance is frequently litigated. Favoring free land use, courts generally construe similar use questions in favor of the least restrictive use.

From Bob Julian, Interested Public Citizen:

[NOTE TO MARTY: Bob Julian, an interested citizen, has been attending many Subcommittee meetings. He created this list of questions to be forwarded with those of the Subcommittee. The Subcommittee requested that you know that they do not necessarily endorse these questions, rather the Subcommittee would like to pass them along to you for your perusal. If you find that any of these questions directly pertain to the issues the Subcommittee is addressing, please consider including that information in your response/our discussion. The Subcommittee prefers that you first address the questions above.]

1. In the County Attorney's opinion has the formation of this Subcommittee complied with state laws governing notification, formation, selection of members, and adoption of authority? If yes, state the relevant citations with which this Subcommittee has complied. If no, is the County Attorney's office willing to investigate the methods used to form the Subcommittee to determine if the Subcommittee has met state or county legal requirements?
2. In the County Attorney's opinion what legal basis will the recommendations of the Subcommittee have regarding modifying the methods of formation of new zoning districts? What legal basis is this authority assumed by the Subcommittee?
3. Is there a legal basis for the County Commissioner's to reject a proposed new zoning district if the freeholders of that district have voted 100% in favor of the proposed district and if the Planning Board votes in favor of forming the district? If so, what is the specific legal citation supporting the Commission's ability to reject such a proposed district?
4. In zoning districts that have less than 100% freeholder consensus, can a dissenting freeholder opt out of the new proposed zone? What is the legal citation that supports either a yes or no answer to this question?
5. If a freeholder does have the legal basis of opting out of a new proposed zoning district, what legal power does any individual or new zone subcommittee have to force a freeholder to be included in a new proposed zoning district in which the freeholder does not want to belong? What is the legal citation for this answer?
6. If a zoning district formation process does not include any individual from a public office in a group that is forming a new zoning district, is that group forming a new zoning district required to notify the public of meetings that the group conducts during the course of forming a new zoning district? If yes, please state the legal reference for this requirement.
7. Has the county ever defended itself against any freeholder or new proposed zoning districts in a claim relating to the powers of the state or county to institute a new zoning district? If so, describe the claim or lawsuit and provide a description of the action and location of the documentation for further review.
8. Has the County Attorney's office identified or studied the number and types of lawsuits resulting from zoning formation in other jurisdictions either in Montana or other states? If so, provide the documents relating to this question.
9. Has the County Attorney's office prepared (or has hired a consultant or outside counsel to prepare) any briefing documents for either the County Commissioners, Planning Department or Planning Board that renders background, citations, or opinions related to formation of zoning districts in

either Gallatin County, Montana or other states? If so, provide the references and location of documents for further review.

10. What amount of liability insurance does the County have to address claims that arise related to formation of new zoning districts? Has a claim related to formation of a new zoning district ever been filed? If so, explain?
11. If the County Attorney is unable or unwilling to answer any (or some) of the above questions, please state the reasons. If the above questions cannot be answered by the County Attorney, please state how these questions can be answered since they are very relevant to understanding and structuring the process of new zoning district formation.

APPENDIX 8: EXISTING ZONING DISTRICT REGULATION EXAMPLES

Available at Planning Department; to be available with final report.

APPENDIX 9: EXAMPLE OF SOUTH COTTONWOOD ZONING DISTRICT
PRESENTATION TO COUNTY COMMISSIONERS.

To be included with final report.

APPENDIX 7: MODEL ZONING REGULATION

Available at Planning Department; to be included in final report.

XII. Minority Report(s)

Minority Report of the Gallatin County New Zoning District Subcommittee

By Dan Griffing
August 15, 2005

Introduction

This is a minority report of the New Zoning District Subcommittee (*also referred to as the committee in this report*) which was appointed by the Gallatin County Commission February 8, 2005. This report covers issues not addressed satisfactorily in the committee report. Overall, I am satisfied with the main report. The committee bent over backwards to reach an overall consensus in it. I am probably the strongest property rights advocate on the committee although other members strongly support property rights as well. Even though property rights supporters were a minority on the committee we all managed to work diligently together to achieve a consensus in the report. I am generally satisfied with the committee's attempt to incorporate my views into the report.

We achieved a *consensus* by focusing on the *process* for creating zoning districts, specifically the *fairness* of the process to the affected *freeholders* – and equally by *avoiding* issues related to the *content* of zoning district regulations. We found we could move forward on issues related to fairness of the process but could only reach an impasse on issues related to the content of the regulations and with reasons for or against creating zoning districts.

A *side-effect* of only addressing issues when there is a *consensus* is that the resulting report is somewhat “sugar-coated” and does not address issues that are difficult and contentious or involve the conflicting views of the committee. Because of this, the minority report will address the following issues:

- Problems *motivating* the creation the committee
- Problems *from* the creation of the committee
- The Growth Policy Petition Requirements
- How the report could have been improved
- Can the report recommendations solve the problems?

I make no pretense that these issues from any other perspective except my own. But I also welcome the inclusion of minority reports from other committee members or members of the public who have issues to present from their own perspectives as well.

Problems Motivating the Creation of the Committee

The Gallatin County New Zoning District Subcommittee was created because the process for creating zoning districts was experiencing the following problems:

- The Gallatin County Growth Policy contains the concept of “citizen-initiated 201 zoning districts”. This appears to have been done to make 201 districts more politically acceptable than their unadorned statutory “top-down” zoning nature would suggest by blurring the distinction between them and the more voluntary freeholder petition-initiated 101 zoning districts. In practice, the “citizen-initiated 201 zoning districts” were implemented outside of any carefully defined and monitored process to ensure fairness. This has resulted in the pitting of neighbor against neighbor because the zoning advocates (the *zoners*) had an unfair advantage of being granted the special privilege of working with the county planning department to formulate regulations to control the property rights of their neighbors, (the *zonees*). The consequence of this has been a vehement “citizen-initiated” opposition to zoning districts.
- 201 zoning districts must comply with the Growth Policy by state statute. But this raises concerns among property owners because the Growth Policy contains goals referring to such things as
 - conservation of scenic resources,
 - wildlife habitat,
 - wetlands and stream set-backs,
 - open space dedication, and
 - the preservation of even marginal agriculture

as rationales to encourage the imposition of regulations to place limits on property owners. These Growth Policy goals and the commission’s rejection of developments outside of 201 zoning districts have provided a carte blanche opportunity for zoning activists to generate excessive zoning regulations. These Growth Policy goals and the commission’s insistence on 201 zoning districts for development have sparked strong opposition by property owners.

- The commission has expressed antipathy for the county land-owner’s right to develop their property. Two commissioners have stated that the development of private property is not a right but a privilege which exists at the discretion of

the commission. This restriction of development has been welcomed by planning advocates and has caused alarm to property rights advocates.

- Numerous problems have arisen in the process of creating “citizen-initiated” zoning districts including:
 - The policy of excluding freeholders opposed to zoning from being members of the county-appointed zoning district committees,
 - The selection of zoning district boundaries unrelated to legitimate zoning district concerns,
 - The imposition of development-limiting zoning densities in zoning districts unrelated to any demonstrable conditions of legitimate government interest for promoting the public health, safety, morals, and general welfare.
 - The right of participation of freeholders and the Open Meeting statute requirements of has been routinely violated by zoning district committees. There was the attitude on the East Gallatin zoning district committee of being a private club and any opponents “would have their turn during the 30-day challenge period”.
 - The advocacy role of the county and planning department siding and working with zoning district proponents versus a role of fair, equal-protection public servants of all citizens.
 - The withholding of freeholder information to the public by the county from the public to effectively oppose zoning districts prior to the 30-day challenge period.
 - The failure of initial attempts to get 60% legal certified petition support from zoning district freeholders for 101 districts and the subsequent attempts by the county to turn 101 district efforts into 201 zoning districts by the county.
 - The creation of §76-2-206, MCA interim “emergency” zoning district against the legal advice of the County Attorney where no emergency existed.
 - The flat refusal by the commission to create a Hamilton Road 101-zoning district which had 100% freeholder support, due to an organized opposition of neighbors living outside of the district.

- The failure of the county to abide by its own binding Growth Policy condition for creating a 201 zoning district which required legal petitions from 60% of the freeholders representing 50% of the zoned acreage.

As a result of these problems, especially the Growth Policy 60% petition requirement, the zoning district creation process was concluded to be in a state of crisis and the commission appointed the New Zoning District Subcommittee to study the problems and make recommendations to resolve them.

Problems *from* the Creation of the Committee

The Commission appointed the subcommittee on February 8th, from applications in response to the public notice announcement in the Bozeman Chronicle. But it was later revealed that a majority of the subcommittee members were actively recruited by the planning department from county's zoning district committees. This introduced an unfair bias into the subcommittee membership. The subcommittee's job was to address problems with the processes used by the zoning district committees and the members recruited from those committees clearly had a conflict of interest. Furthermore, the county planning department had practiced a policy of excluding freeholders opposed to zoning from the committees for drafting the zoning district regulations. The county recruited exclusively from these committees where those expressing a concern for property rights had been excluded. The commission and planning department knew of freeholders opposed to zoning from letters they had received and from past public testimony, but none of them were recruited for the subcommittee. This recruiting which excluded anyone having opposing views tainted the subcommittee from the beginning, and stacked committee with those biased toward zoning districts.

Some of the commissioners and planning department have justified recruiting the subcommittee on the grounds that too few people responded to the public notice. But it would have been better not to recruit from those who were part of the zoning district problem but to publish other more prominent notices. The commission could have met with reporters to request a story about the zoning district problems and publicly request for county property owners to be on the subcommittee. It is not enough to show fairness by allowing one or two property rights advocates to be on a subcommittee when the majority were recruited who shared the views of the planning department and commission. A fair process requires that all of the members be selected fairly, not recruited from those who were already selected in an unfairly biased process.

[I want to stress that I don't blame the members of the committee for the process which was used to select them. In fact, I am quite pleased that they were able to overcome this biased selection process and come to a reasonable consensus on the zoning district process fairness issues. But if the committee selection process had been more balanced and fair, another committee might have been able to reach a consensus on issues related to the content of zoning district regulations that also had a respect for the development and other property rights of freeholders.]

The Growth Policy Petition Requirements

One of the significant issues put to the New Zoning District Subcommittee was the binding 60%/50% legal petition requirement in the Growth Policy because this issue had put the Bozeman Pass and East Gallatin Zoning Districts on hold.

On January 4th the commission held a public hearing to remove the petition requirements from the Growth Policy and agreed to defer action until receiving recommendations from a subcommittee they were to appoint. Following this public hearing the meeting minutes indicate that the commission passed a motion to:

“... direct the Planning Board, after taking public hearing of today and the comments from the Commissioners and through a hearing process, draft changes, propose recommendations to the Growth Policy and advertise for a committee to come up with zoning district formation process recommendation to the County Commission.”

At the February 8th commission meeting, the meeting minutes state:

“9:08:12 AM Chairman Murdock Announcement: Regular agenda Item 6, Public Hearing and Consideration by the Commission of a Resolution of Intention to Amend the Gallatin County Growth Policy. The Commission will hold the hearing, take public comment, and discuss some changes. All decisions will be continued based on the appointment of the sub-committee to investigate a process to create new zoning districts.”

The public record of the January 4th and February 8th meetings indicate the commission's intention to defer amending the growth policy until hearing the recommendations of the sub-committee. But instead of trusting this subcommittee, the commission voted on June 21st to remove the petition requirements from the Growth Policy. The reason given was that the petition requirements *(which had been in place without legal challenges since 1990)* put the county at the risk of *potential* lawsuits which outweighed waiting for the subcommittee recommendations.

The June 21st vote had a negative impact on the committee by removing the freeholder petition issue from their consideration. With the commissioners' a priori resolution against the petition process, the committee understood that there was little point in the

committee giving any serious thought it. One of the most significant decisions facing the committee – the issue of a mechanism to insure freeholder support of zoning districts had been taken out of their hands before they even had an opportunity to address it. This indicates that the commission was more interested in predetermining the result of the committee than in seeking recommendations that would really resolve the zoning district problems they were facing.

How the Report could have been Improved

Although I am generally in agreement with what was said in the main report, there are ways that it could have been improved. But given the committee, the report is better than I could have ever hoped for, and I am not requesting that these changes be made, and I hope these comments are not regarded merely as sour grapes about a report which I have myself contributed to as part of the consensus.

- The report would have been better if it had provided a summarized assessment of each of the zoning districts and issues reviewed. The subcommittee held more than 20 weekly meetings using paid county staff time at county taxpayer expense. For weeks the committee sat through hours of presentations reviewing Gallatin County and other zoning districts. The report should have shown that these meetings were not wasted by summarizing the committee's consensus conclusions about each district.

The reason the committee couldn't summarize these reviews is that they couldn't reach a consensus, even to the extent of agreeing to present the opposing views. To their credit, the committee was able to identify a problem of general fairness with the processes of several of the districts.

I won't lengthen this report by providing an assessment of each zoning district. But nearly all of the districts reviewed appeared to have been motivated by some neighbors' desire to restrict the development rights of their other neighbors and by using an invalid rationale to do so. One example should suffice: the Middle Cottonwood district (adopted in 1996) used mule deer habitat to limit development rights to a maximum zoning density of one residence per 40 acres. The lack evidence of follow-up studies to determine whether the mule deer actually benefited from the zoning district restrictions strongly suggests that wildlife habitat was merely a ruse by opponents to the development of rural residences. Similarly, wildlife habitat was used as a justification for limiting development rights in the public hearing for the Bozeman Pass zoning district.

- Members of the public attended the committee meetings and/or wrote letters to the committee. The report would have been better if it had shown the how committee used this public input in their deliberations. An open process requires more than merely allowing public input – the input should be taken into consideration in the deliberations. The committee would also have been in a better situation to accept public input if their meetings hadn't been scheduled for the middle of the day when most people are at work and unable to attend. The committee would also have had more public input if news of the committee and their work had been more widely publicized. Considering what we were told about the importance of our work, our committee was one of the best kept secrets of any committee holding public meetings and open to public input. I would like to attempt to summarize the contributions of the members of the public who attended our meetings in the briefest way:
 - Quincy OrHai and Phil Olsen attended several meetings and made a special joint presentation to the committee about their perspective of the Bozeman Pass zoning district activities. Quincy and Phil each presented detailed proposals for processes that would result in zoning districts that would meet the consent of district freeholders and prevent motivating them to challenge the districts later on.
 - Bob Julian also attended many meetings and wrote a number of email letters to the committee. Bob expressed concerns that zoning districts and county property regulations cause millions of dollars of damage to the property of landowners, that the zoning district committees did not legitimately represent the freeholders to write regulations for their property and that the new zoning district subcommittee itself was not legitimately formed to address zoning district creation.
 - Anson Crutcher attended several meetings with concerns about Montana's Open Meeting laws, Article II, Section 8 of Montana's Constitution for the right to participate in government processes prior to the final decision. Anson also pointed out the 2004 Montana Supreme Court Yurczyk decision which overturned a zoning ordinance ruling for reasons including equal protection violations.
 - Marc Seifert attended at least half of the meetings and gave fairly frequent public comments in support of property rights.
 - Priscilla ("Sil") Strung attended many of the meetings as a member of the South Cottonwood zoning district and spoke in favor of zoning districts and a fair process.

- The committee spent considerable time and effort drafting legal questions for the County Attorney who came and spent another whole meeting discussing those questions. The report would have been better if it had shown the deliberations of the committee from these legal opinions and the consensus reached on them. Here are some of the highlights from the County Attorney's legal opinions:
 - In contrast to 101 districts, 201 zoning districts may not prevent the complete use, development, or recovery of any mineral, forest, or agricultural resources (§76-2-209)
 - Certified legal petitions were legally required for 201 zoning district (when the requirement was in the Growth Policy).

In contrast, the County Attorney also stated in a different opinion:

"Gallatin County does not have self-governing powers. Gallatin County is therefore a government of limited powers, meaning it has only those powers expressly given to it by the Legislature and those powers that may be reasonably implied from the Legislature's express grants of power.

Given this limitation, Gallatin County does not have the authority to change state statutory procedural requirements for creation of zoning districts. Because the statutes that govern the creation of 201 districts make no mention of a petition, Gallatin County may not impose a petition requirement for creation of a 201 zoning district.

It is the application of this indefensible petition requirement that concerns me, not the mere fact that it currently is part of Gallatin County's Growth Policy. The application of this petition requirement may allow an aggrieved party to a zoning district dispute to bring a successful lawsuit against the County."

[I have previously stated my opposition to this legal opinion because it appears to be selectively and conveniently applied to the Growth Policy petition issue which had been in effect since 1990 without legal challenge or objection from the current County Attorney's predecessors. Many of the county resolutions, elements of the Growth Policy and Subdivision regulations would not pass the "county non-self governing powers" criteria, yet the County Attorney hasn't raised objections to them. By this same principle, the county cannot require any zoning district creation process to achieve fairness in accordance to the recommendations of this subcommittee because: "Gallatin County does not have

the authority to change state statutory procedural requirements for creation of zoning districts".]

- The privacy interests of the citizens or entities involved do not exceed the merits of public disclosure of freeholder information to the public so the freeholder information should be disclosed to the public.
- There must be a valid emergency for the use of §76-2-206 to create an interim zoning district and map. Bozeman Pass met the criteria while Bridger Bench did not.
- Zoning district committees selected by the commission or assisted and directed by paid county staff are subject to Open Meeting Laws. The New Zoning District Subcommittee is subject to open meeting laws but was not complying with the public notice provisions. Public notice requirements for zoning district committees must be made county-wide.
- The report would have been better if it had recommended that the committee's recommendations be applied to all zoning districts that had not yet been adopted. Several zoning districts are currently being worked on but have not been adopted. Most notably these are the Bozeman Pass and East Gallatin Zoning Districts which caused many of the problems motivating the creation of this committee. Committee members have said that these districts are so far along that making them adhere to a process to insure fairness would impose an unreasonable hardship on the zoning district committees. To me this shows a lack of concern for the necessity of a fair process to protect the rights of the district freeholders that are put in jeopardy by an unfair zoning district. *[By comparison, a lynch mob is not allowed to proceed because it would be unfair to them to undo all the trouble they've gone to in finding a rope a horse and a tree – the rights of the person condemned without a fair trial are all that really matters.]*
- The report would have been better if it had been more adamant in requiring a process in which the committee members are selected by the freeholders in the proposed zoning district. The committee did accept many of my suggestions, and the report goes pretty far in this direction, so I'm not *sharply* criticizing them over this – I simply wish they had gone a little farther. My reason for concern about this is because the county has been so egregiously guilty of manipulating the committee membership to favor zoning proponents that the term "citizen-initiated zoning" has come to mean "activist-initiated zoning". For the same reason that democracy requires fair elections the zoning process needs to fairly represent all of the freeholders whose property will be affected. This requires that freeholders select who will represent them on the zoning

committees, not outside county officials or planning bureaucrats using quotas for membership to arbitrarily determined collectivist categories.

- The report would have been better if it had been more *adamant* in requiring that the county submit the package of the final draft of the zoning district regulations and the zoning map to the freeholders of the district for formal approval (*as they did in the South Cottonwood Zoning District*). This would provide a similar protection of freeholder property rights as the 60%/50% petition requirements which had been in the Growth Policy. Such a requirement for zoning district adoption would demonstrate the fairness of the district by having the county shoulder burden showing freeholder support because the 30-day statutory challenge by 40% of the property owners would then be statistically impossible to achieve. The committee was *soft* on this issue which was understandable, given the way they were recruited and given the fact that the commission *pre-empted* this issue on June 21st by voting to remove the Growth Policy petition requirements.
- The report would have been better if it had *properly* addressed zoning district *content* issues. A zoning district freeholder's property rights would be better protected if a zoning district creation process included certain requirements on the *contents* of the regulations. These would require designating each regulation as either a *public use* or a *police power* regulation. The *public use* regulations would *require* just compensation for any taking imposed on private property or values to private property. A *police power* regulations would be *required* to be a "*constitutional exercise of police power if it has a substantial bearing upon the public health, safety, morals or general welfare of the community*" [Yurczyk v. Yellowstone County, Montana Supreme Court, 2004 (02-062)]. Every regulation in a zoning district must either compensate the freeholders for a legitimate taking for *public use* (view-shed, open space, wildlife habitat, stream setback) – or must be necessitated by a provable connection to conditions that affect the public health, safety, morals or general welfare of the community which is the *only* legitimate justification for *police power*. The U. S. Supreme Court opinion of *Nollan v California Costal Commission* US 1987, *Lucas v S Carolina Costal Council* US 1992, and *Dolan v Tigard* OR US 1994 have addressed these issues extensively.

Can the Report Recommendations Solve the Problems?

Although I am generally in agreement with the committee's report, I am not at all optimistic that if adopted, the recommendations will fix the process of creating new zoning districts. As I have said before, an improved zoning district creation process cannot work if it is only treated as a set of *guidelines* like the "*Pirate's Code*" in the

movie "*Pirates of the Caribbean*". To work, a process for creating zoning districts must be fair and *mandatory* and have the county's commitment to be followed *fully* as their solemn promise to the Gallatin County citizens and freeholders. But here is the problem. If any county-enacted resolution to require certain procedures for creating zoning districts is legally interpreted as *overriding* or changing state statutory requirements *then the county may not do it*. The County Attorney's opinion states: "Gallatin County does not have the authority to change state statutory procedural requirements for creation of zoning districts."

The same legal opinion which the county used conveniently to eliminate the Growth Policy petition requirements comes to bite them in the end by preventing them from fixing the current flawed district creation process!

Furthermore, by this same legal opinion, the *current* zoning district creation process with "*citizen-initiated 201*" zoning districts exceeds the county authority because nothing in the 201 statutes gives the county the authority for a "*citizen-initiated 201*" process.

It would be ironic indeed if after six months work to solve problems with the zoning districts creation process – allegedly brought about by the County Attorney's legal advice to get rid of the Growth Policy petition requirements – that any improvement in the process, and in fact the current process itself were found to be prohibited by that same legal opinion. If this is true I can only agree with comments I heard from Commissioner Murdock back in May to the effect that the County Attorney could have saved us all a lot of time and trouble if he had advised us on these legal issues a long time ago.